

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ST. CLAIR INTELLECTUAL PROPERTY
CONSULTANTS, INC.,

Plaintiff,

v.

ACER, INC., et al.,

Defendants.

C.A. No. 09-354-LPS
(Consolidated)

JURY TRIAL DEMANDED

MICROSOFT CORPORATION,

Plaintiff,

v.

ST. CLAIR INTELLECTUAL PROPERTY
CONSULTANTS, INC.,

Defendant.

C.A. No. 10-282-LPS

PUBLIC VERSION

**REPLY MEMORANDUM OF LAW ADDRESSING *BOZIC* IN SUPPORT OF
DEFENDANTS' MOTION FOR SPOILIATION SANCTIONS AGAINST PLAINTIFF**

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St. Clair argues that *Bozic v. City of Washington, Pa.*, No. 2:11-cv-674 (MRH), 2012 WL 6050610 (W.D. Pa. Dec. 5, 2012) is “factually inapposite” and “far removed” from this case because (1) there was no dispute in *Bozic* that the Solicitor had control of the tape he erased; and (2) Fung and Olson purportedly made an “honest mistake” and did not destroy the Vadem tapes with the “specific intent” of keeping them out of Defendants’ hands. Neither of these arguments distinguishes *Bozic*, or undercuts Defendants’ arguments for spoliation sanctions.

I. ARGUMENT

A. St. Clair Had Control Over The Spoliated Documents

As an initial matter, St. Clair suggests that its alleged lack of physical control over the spoliated Vadem tapes is a point of distinction over *Bozic*. [D.I. 880 at 1-2]. But Fed. R. Civ. P. 34 is not limited to direct physical control; rather, it extends to any scenario which includes “the legal right or ability to obtain the documents from another source upon demand.” *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004). [D.I. 642 at 14-15; D.I. 841 at 7-9]. St. Clair unquestionably had control over the Vadem tapes under this standard.

Mr. Rader obviously believed that St Clair had the ability to control Vadem’s documents when he wrote to Olson that [REDACTED]

[REDACTED] [D.I. 841 at 2]. Rader’s statement was not just an “angry” reaction, as St Clair’s counsel suggested during oral argument. [Ex. 1 3/27/13 Tr. at 250:3-7]. Rather, Rader had ample reason to believe that St. Clair had the power to control Vadem’s documents based on St. Clair’s legal and practical relationship with Fung, Amphus and Vadem throughout this litigation. [D.I. 642 at 3-8, 14-15; D.I. 841 at 6-9].

St. Clair's after-the fact effort to draw a distinction between Vadem and Amphus (whose documents St. Clair does not deny it controls) is contradicted, *inter alia*, by Fung's own deposition testimony, which confirms that any distinction between the two companies is entirely metaphysical:



[Ex. 2 at 533:21-534:8]. Clearly, if Fung did not distinguish between Amphus and Vadem, the Court should not do so either in determining St. Clair's control over the spoliated tapes for purposes of Rule 34. *See also, In Re NTL Inc. Secs. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007).

B. St. Clair's Conduct Meets The Bad Faith Standard Under *Bozic*

St. Clair also cannot distinguish *Bozic* by arguing that the court's bad faith finding was premised on the Solicitor's alleged nefarious intent. [D.I. 880 at 3]. Although the court was critical of the Solicitor's claim that he did not anticipate litigation when the tape was erased, it specifically declined to find that the Solicitor destroyed the tape with "the specific malicious intent" of keeping it from the plaintiff. *Bozic*, 2012 WL 6050610, at *12. Rather, the court based its bad faith finding on the Solicitor's "reckless disregard for the consequences of an intentional and conscious destruction of evidence . . . at a time when litigation is necessarily foreseeable." *Id.* at *10. The same circumstances are present here. It simply is not credible to believe that Olson made an "honest mistake." [D.I. 642 at 4, 18; D.I. 841 at 4, 11]. No one could have reasonably believed the tapes had been copied when Olson and Fung ordered them destroyed. [*Id.*]. Defendants, therefore, respectfully urge the Court to order spoliation sanctions against St. Clair, as set forth in Defendants' opening brief. [D.I. 642 at 17-20].

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CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on April 23, 2013, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

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